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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF ARIZONA**

12 ADULT PRINTED DIAPERS, LLC, an
13 Arizona limited liability company
14 Plaintiff,

15 v.

16 REARZ, Inc., a Canadian corporation, Cooshie
17 Tooshiez, LLC D.B.A. Crown Diapers, a Utah
18 limited liability company, Faithfulness, LLC,
19 Personal Care Medical Supplies, The Bottom
20 Half Group, LLC, Northeast Mobility Center,
21 Soft Cradle Company, Daynitecare.ca, and
22 Littleforbig.com.

23 Defendants.

No.: 2:2018-cv-00370-DJH

**JOINT CASE MANAGEMENT
REPORT**

24 Pursuant to Federal Rule of Civil Procedure 26(f) and the Court's March 15, 2018 Order
25 setting Rule 16 Case Management Conference [doc. 20], Plaintiff Adult Printed Diapers, LLC
26 ("ADP"), Defendant Rearz, Inc. ("Rearz"), and Northeast Mobility Center jointly submits this
Case Management Report.

Attendance.

Rearz, APD, and Northeast Mobility Center held a telephonic conference to discuss the
matters related to this report. For APD, Justin Clark of J. Clark law Firm, PLLC participated.

1 For Rearz, Ken Motolenich-Salas of Gallagher of Gallagher and Kennedy and Anderson Duff of
2 Revision Legal participated. For Northeast Mobility Center, Samantha Butler of Quintairos,
3 Prieto, Wood, & Boyer, P.A.. participated.

4 **1. Parties.**

5 Plaintiff: Adult Printed Diapers, LLC

6 Defendants: Rearz, Inc., Cooshie Tooshiez, LLC D.B.A. Crown Diapers, a Utah limited
7 liability company, Faithfulness, LLC, Personal Care Medical Supplies, The Bottom Half Group,
8 LLC, Northeast Mobility Center, Soft Cradle Company, Daynitecare.ca, and Littleforbig.com.
9 As of the date of this Joint Case Management Report, Rearz and Northeast Mobility Center have
10 been served.

11 **2. Nature of the Case.**

12 a. Plaintiff's Statement

13 Plaintiff files this action for trademark infringement, false designation of origin, false
14 advertising, and unfair competition under the Lanham Act, copyright infringement under the
15 United States Copyright Act, tortious interference with prospective economic advantage,
16 conversion, and unjust enrichment. On information and belief, Defendant Rearz contacted
17 Plaintiff ADP's supplier in China and purchased inventory bearing ADP's trademarks without
18 ADP's authorization. These products had been manufactured exclusively for APD. Without
19 ADP's authorization, Rearz then imported these products into Canada where it took possession
20 of the products. Once it had possession of the products, it sold large quantities to other
21 distributors downstream, including Defendants Cooshie Tooshiez, LLC D.B.A. Crown Diapers,
22 a Utah limited liability company, Faithfulness, LLC, Personal Care Medical Supplies, The
23 Bottom Half Group, LLC, Northeast Mobility Center, Soft Cradle Company, Daynitecare.ca,
24 and Littleforbig.com. Rearz, as well as the other Defendants who are downstream distributors,
25 prominently used APD trademarks (including logos displayed on websites where APD branded
26 products were sold and use of the AWW SO CUTE word mark on websites and in keywords

1 associated with websites). Rearz and the downstream Defendants sold substantial volumes of
2 APD branded products and realized significant profits from these sales. Rearz and the
3 downstream Defendants also used original, creative artwork owned by APD to advertise and
4 promote their products.

5 As a result of the unauthorized use of APD's trademarks and copyrighted works, Rearz
6 and the other Defendants have caused consumer confusion as to the source of the APD branded
7 products they sold. Rearz and the other Defendants have also caused consumer confusion as to
8 the nature of affiliation or sponsorship between themselves and APD. In addition to losing any
9 profits that APD might have obtained as a result of the sale of its APD branded products, the
10 market for APD's products has been irretrievably harmed and APD's total sales have dropped
11 significantly. Rearz and the other Defendants intentionally caused this harm to APD.

12 b. Defendant Rearz's Statement.

13 Rearz is a small business that has endured the misfortune of Plaintiff's misplaced ire. Rearz has
14 purchased authorized AWW SO CUTE branded goods from third parties and Plaintiff itself.
15 Rearz is therefore protected by the first sale doctrine. Plaintiff or its agent, acting on a
16 misunderstanding or deliberate misconstruction of the first sale doctrine and the laws governing
17 parallel importation, have intentionally and maliciously interfered with Rearz's business
18 associates and prospective business associates by, among other things, calling third parties and
19 falsely claiming to be an attorney in an effort to intimidate Rearz, its business associates, and its
20 prospective business associates. Upon information and belief, Plaintiff and its agents also
21 published defamatory statements about Rearz in online fora with the goal of driving customers
22 away from Rearz. After Rearz filed its Answer with counterclaims asserting as much, Plaintiff
23 began purging its official online accounts of defamatory content. Unfortunately for Rearz, the
24 damage to Rearz's brand caused by Plaintiff is irreparable.

25 In a good faith effort to avoid litigation, Rearz shared its relevant records showing inventory of
26 the allegedly infringing goods. Plaintiff has taken the position that the documents provided by

1 Rearz are inaccurate. As both Plaintiff and the Court will see, the documents provided by Rearz
2 in a good faith attempt to avoid wasting judicial resources were and are accurate.

3 Even if Plaintiff ultimately succeeds on the merits of its claim, the documents Rearz provided
4 demonstrate that the inventory at issue is not significant. When Rearz acted in good faith to
5 resolve this matter short of litigation, Plaintiff made facially absurd demands not tethered to any
6 of the facts or any applicable law. Viewed in conjunction with Plaintiff's extra-judicial
7 interference with Rearz's business, Plaintiff's lawsuit is misguided at best and pretextual at
8 worst. One illustration of Plaintiff's motive is its allegation that Rearz uses Plaintiff's trademark
9 as a search engine keyword to drive online traffic. Rearz has denied this allegation and, in part
10 because Rearz discovered showing that Plaintiff uses Rearz's trademark as a search engine
11 keyword to drive internet traffic, has asserted the affirmative defense of unclean hands.

12 **Defendant Northeast Mobility Center's Statement:**

13 Defendant Northeast Mobility Center ("NEMC") is a boutique, family-owned medical supply
14 and equipment company that sells a variety of supply solutions, including adult diapers. All of
15 Plaintiff's claims against NEMC stem from an alleged unauthorized resale of Aww So Cute
16 diapers. Upon information and belief, NEMC purchased a small quantity of authorized, Aww
17 So Cute brand diapers from Aww So Cute and from Third-Party Defendant Rearz, which
18 NEMC resold to its customers in the condition in which the products were received. In
19 accordance with the First Sale Doctrine, such sales were authorized and protected from the
20 claims alleged by Plaintiff in the instant case. Defendant NEMC denies liability for each and
21 every claim asserted against it by Plaintiff. NEMC further denies that any of its actions caused
22 or contributed to Plaintiff's alleged damages. NEMC also asserts all available affirmative
23 defenses alleged in its Answer, which was filed on April 20, 2018.

24
25 **3. Jurisdiction**

26 Pursuant to 28 U.S.C. § 1331, the Court has original jurisdiction over this action because

1 Plaintiff alleges violations of the Lanham Act, 15 U.S.C. § 1225, *et seq.* and violations of the
2 Copyright Act, 17 U.S.C. § 101, *et seq.* The Court has supplemental jurisdiction over Plaintiff's
3 state law claims pursuant to 28 U.S.C. § 1367.

4 **4. Service of Parties**

5 Rearz was served by process server in March 2018; it has since answered the Complaint
6 and filed a counterclaim against APD. Defendant Northeast Mobility Center was served by
7 process server in March 2018 and timely filed its Answer on April 20, 2018. Plaintiff is in the
8 process of serving the remaining Defendants.

9 **5. Additional Parties / Amending Pleadings**

10 Plaintiff may, during the course of conducting discovery with the other Defendants,
11 identify additional parties that may need to be included. In such a case, Plaintiff will seek leave
12 of court to amend the Complaint to add these parties and/or any other additional claims that it
13 might identify it has against any of the Defendants.

14 **6. Contemplated Motions**

15 Plaintiff may move to file a Motion to Dismiss Defendant Rearz's Counterclaim for
16 failure to state a claim for which relief can be granted if the Counterclaim is not amended to
17 provide more clarity to put APD on notice for defense of plausible claims. Plaintiff may also
18 move to file a Motion for Judgment on the Pleadings or, in the alternative, a Motion for
19 Summary Judgment on some or all of the claims following discovery. Absent an amicable
20 settlement of this matter, Rearz anticipates either a motion for judgment on the pleadings
21 pursuant to Rule 12(c) of the Fed. R. Civ. P. as to all of the claims asserted by APD against
22 Rearz after APD files its responsive pleading and pending review of information provided
23 pursuant to MIDP and/or a motion for summary judgment as soon as adequate discovery may be
24 had. Defendant NEMC also anticipates filing a Motion for Summary Judgment when
25 appropriate.

26 **7. Referral to Magistrate Judge**

1 The parties believe that the appointment of a Magistrate Judge is appropriate for the
2 purposes of presiding over a settlement conference between the parties. Otherwise, the parties
3 do not believe that this case is suitable for reference to a United States Magistrate Judge for trial.

4 **8. Related Cases**

5 None.

6 **9. Issues Relating to Preservation, Disclosure, or Discovery of Electronically Stored**
7 **Information**

8 The parties are aware that some evidence involved in proving the parties' claims and
9 defenses in this case involved ESI. During the telephonic conference, counsel for APD and
10 Rearz discussed the importance of preserving ESI, and expect to have further discussions
11 regarding provision of ESI. If disagreements arise relating to the production of certain ESI, the
12 parties will meet and confer prior to service of objections and responses to discovery. ESI shall
13 be provided by the parties in PDF format, TIFF images, or other useable agreed-upon format.

14 **10. Issues Relating to Claims of Privilege or Work Product**

15 None identified or anticipated at this time.

16 **11. Order Under Federal Rule of Evidence 502(d)**

17 Plaintiff ADP and Defendant Rearz believe that some of the information involved in this
18 case is commercially sensitive and merits protection from the public eye or dissemination.
19 Consequently, ADP and Rearz plan to file a stipulated protective order. Depending upon the
20 information requested by Plaintiff, Northeast Mobility Center may also request a protective
21 order prior to disclosing sensitive or otherwise confidential information.

22 **12. Compliance with the MIDP**

23 ADP and Rearz plan to serve their MIDP responses upon each other no later than May 2,
24 2017. Northeast Mobility Center will serve its MIDP responses by May 21, 2018.

25 **13. Discovery**

26 a. **The extent, nature and location of discovery anticipated by the parties.**

1 The parties expect much of the discovery to come from records maintained by the parties,
2 written discovery responses, and depositions. Discovery is expected to take place in Arizona
3 New York and Ontario, Canada. At this time, the parties have not identified specific witnesses
4 that they would like to depose.

5 b. **Suggested changes, if any, to the discovery limitations imposed by the Federal**
6 **Rules of Civil Procedure.**

7 None.

8 c. **The number of hours permitted for each deposition.**

9 At this time, none of the parties have identified specific witnesses that they would like to
10 depose. Once the parties have identified specific witnesses, they will confer to discuss any time
11 limits for conducting each deposition.

12 **14. Service of MIDP Discovery Responses**

13 ADP and Rearz plan to serve their MIDP responses upon each other no later than May 2,
14 2017. Northeast Mobility Center will serve its MIDP responses by May 21, 2018.

15 **15. Deadlines**

16 Completion of Fact Discovery and Deadline for Final Supplementation of Discovery
17 Responses under the MIDP: November 2, 2018

18 Expert Disclosures: As both APD and Rearz assert claims, the parties propose a
19 simplified expert disclosure plan wherein the parties share deadlines for opening and rebuttal
20 expert disclosures on their respective claims for which the party bears the burden of proof.

21 Expert Disclosures on Claims for Which the Party Bears the Burden of Proof:
22 December 7, 2018

23 Rebuttal Expert Disclosures: January 11, 2019

24 Completion of Expert Depositions (Close of Expert Discovery): February 1, 2019

25 Deadline for Filing Dispositive Motions: March 15, 2019

26 **16. Deadline for Face-to-Face Good Faith Settlement Talks: September 21, 2018**

1 **17. Request for Jury Trial**

2 APD and Rearz have demanded a jury trial. The demand is not contested.

3 **18. Estimated Length of Trial**

4 Four days.

5 **19. Settlement Prospects**

6 Prospects for settlement are uncertain at this time. The parties will request reference to a
7 Magistrate Judge for a settlement conference

8 **20. Other Matters**

9 None at this time.

12 **J. Clark Law Firm, PLLC**

13 By: /s/Justin Clark
14 Justin M. Clark
15 *Attorney for Plaintiff/Counterclaim*
16 *Defendant Adult Printed Diapers, LLC*

18 **Gallagher & Kennedy, P.A.**

19 By: /s/Kenneth Motolenich-Salas
20 Kenneth Motolenich-Salas
21 *Attorney for Defendant/Counterclaim*
22 *Plaintiff Rearz, Inc.*

22 **Revision Legal, PLLC**

23 By: /s/Anderson Duff
24 Anderson Duff
25 *Attorneys for Defendant/Counterclaim*
26 *Plaintiff Rearz, Inc.*

Quintairos, Prieto, Wood & Boyer, P.A.

By: /s/Samantha Butler

Terence N. Cushing, Esq.

Samantha L. Butler, Esq.

Attorneys for Defendant Northeast Mobility
Center

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3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on the 30 day of April, 2018, I electronically transmitted the
5 foregoing to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice
6 of Electronic Filing to all CM/ECF registrants in this action.

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By: /s/Justin Clark